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In the Supreme Court of the United States

OCTOBER TERM, 1995

CAL-ALMOND, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether principles of sovereign immunity barred the district court from ordering the government to reimburse petitioners for funds that they paid to third parties for "creditable advertising," which offset assessments petitioners would otherwise have paid under a marketing order later held to be unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-18a) is reported at 67 F.3d 874. An earlier opinion of the court of appeals (Pet. App. 19a-61a) is reported at 14 F.3d 429. The order of the district court (Pet. App. 70a-94a) and the judgment of the district court (Pet. App. 62a-69a) are unreported. The four earlier orders of the district court are not officially reported. Three of those orders are published, however, at 51 Agric. Dec. 44, 85, and 79. The opinions of the Judicial Officer of the Department of Agriculture are reported at 50 Agric. Dec. 23, 171, and 183.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1995. A petition for rehearing was denied on February 20, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on May 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act (AMAA) of 1937, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue marketing orders to maintain market stability for certain agricultural commodities, including almonds. 7 U.S.C. 608c(1), (2) and (3). Pursuant to that authority, the Secretary has promulgated a marketing order regulating the handling of almonds grown in California. 7 C.F.R. 981.1-981.92. The marketing order is administered by the Almond Board of California (the Board), a body composed of industry representatives appointed by the Secretary. 7 C.F.R. 981.30-981.40.[1]

The AMAA provides that a marketing order may establish "marketing research and development projects designed to assist, improve, or promote the marketing" of almonds. 7 U.S.C. 608c(6)(I). Since 1971, the marketing order for California almonds has authorized the Board to conduct a generic advertising

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[1] The members of the Board serve without compensation and are subject to removal by the Secretary at any time. See, *e.g.*, 7 C.F.R. 981.33, 981.37, and 981.40(d). The Board is responsible for recommending a yearly budget for administering the marketing order (including a budget for advertising and other types of promotion), which the Secretary may accept or reject. 7 U.S.C. 608c(7)(C); see, *e.g.*, 7 C.F.R. 981.41.

program for that commodity. See 36 Fed. Reg. 20,887 (1971); 59 Fed. Reg. 35,224 (1994).

The Board's activities, including its administration of the generic advertising program,[2] are funded through mandatory assessments on almond "handlers" (i.e., processors and distributors of almonds, see 7 C.F.R. 981.13, 981.16), based on the volume of almonds that they handle, see 7 U.S.C. 608c(6)(I), 610(b)(2)(ii); 7 C.F.R. 981.41(a), 981.81(a). Under the marketing order, a handler may receive a limited credit against the portion of its assessment that is attributable to promotional activities by the Board if the handler engages in certain private promotional activities (including paid advertising) that promote the sale and usage of almonds and almond products. 7 U.S.C. 608c(6)(I); 7 C.F.R. 981.41(c). Those private activities are known as "creditable advertising." The Secretary has issued regulations establishing the criteria to be used by the Almond Board in determining whether monies spent by a handler for promotional activities may be credited against the handler's assessment. 7 C.F.R. 981.441.

During the crop years at issue in this dispute,[3] the creditable advertising regulation, 7 C.F.R. 981.441

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[2] Although the Board has been authorized to conduct generic advertising since 1971, it did not do so during the time period at issue in this case. Rather, the Board engaged only in generic almond promotion activities such as distributing almond recipes and producing promotional materials for school lunch programs. See Pet. App. 22a.

[3] Petitioners' First Amendment challenge to the generic advertising program for almonds involves the crop years 1980-1981 through 1991-1992. While that claim was under submission to the court of appeals, the Secretary promulgated an interim final rule proposing revisions to the creditable advertising

(1992), provided that, in order for a handler to receive credit for its marketing promotion expenditures, "[t]he clear and evident purpose of each advertisement" must have been to "promote the sale, consumption, or use of California almonds." 7 C.F.R. 981.441(c)(2) (1992). The regulation further provided that certain types of advertising would not earn credit: advertising of more than two "complementary" products; advertising of products that contain less than 50% almonds; advertising that referred to "competing [types of] nuts"; and advertising that directed consumers to specific retail stores. 7 C.F.R. 981.441(c)(3)(iv) and (c)(5)(i)-(iii) (1992).

The AMAA affords a handler the opportunity to petition the Secretary for relief from any provision of a marketing order on the ground that the provision is "not in accordance with law." 7 U.S.C. 608c(15)(A). A handler who is dissatisfied with the final action of the

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regulation in the almond marketing order. 58 Fed. Reg. 43,500 (1993). Several of the proposed revisions concerned restrictions on the types of advertising by individual almond handlers for which credit was available. See *id.* at 43,501-43,503. The court of appeals issued its decision invalidating certain provisions of the prior marketing order in December 1993. Pet. App. 19a-61a. Following that decision, the Secretary reopened the period for comments on the proposed revisions to the creditable advertising regulation. 59 Fed. Reg. 4247 (1994). In particular, the Secretary invited comments on the potential effect of the court of appeals' decision on that regulation. *Ibid.* The Secretary adopted a final rule revising the creditable advertising regulation in July 1994. 59 Fed. Reg. 35,222 (1994). The revisions, *inter alia*, eliminate many of the former restrictions on the types of advertising for which an individual handler may receive credit against its assessment. See *id.* at 35,226-35,227. The current regulation is not at issue in this case.

Secretary in an administrative proceeding may seek judicial review of that action in the district court, which is "vested with jurisdiction in equity to review" the Secretary's ruling. 7 U.S.C. 608c(15)(B).

2. a. Petitioners are handlers and producers of almonds grown in California who are subject to the almond order. Petitioners Cal-Almond, Inc., Saulsbury Orchards and Almond Processing, Inc., and Carlson Farms filed an administrative petition with the Secretary pursuant to 7 U.S.C. 608c(15)(A) alleging, among other things, that various provisions of the marketing order for California almonds, including certain provisions of the creditable advertising regulation, violated the First Amendment. Pet. App. 23a. In separate administrative petitions, petitioners Cal-Almond, Gourmet Packing Co., and Gold Hills Nut Co. also challenged the lawfulness of various provisions of the order and the accompanying creditable advertising regulation on First Amendment grounds. *Id.* at 24a. In all four proceedings, the Judicial Officer (JO) of the Department of Agriculture, acting on behalf of the Secretary, rejected petitioners' claims. *Id.* at 23a, 24a.

b. Petitioners sought review of the JO's decisions in the United States District Court for the Eastern District of California, pursuant to 7 U.S.C. 608c(15)(B). The district court upheld the JO's rulings in all respects. Pet. App. 24a.

c. The court of appeals affirmed in part and reversed in part. Pet. App. 19a-61a. The court rejected petitioners' non-constitutional challenges to the administration of the marketing order.[4] It

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[4] Those claims concerned the procedures by which assessments were imposed under the order (Pet. App. 39a-46a); the

further concluded, however, that the almond promotion program violated the First Amendment.

In addressing petitioners' First Amendment challenge, the court applied the test that this Court set out in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980), for determining the constitutionality of regulations that suppress or limit commercial speech. The court of appeals agreed with the government that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial governmental interest. It concluded, however, that the Secretary had failed to satisfy the *Central Hudson* standard because, in its view, the almond advertising regulations did not "directly advance" the government's asserted interest in increasing almond sales, and were more "extensive than necessary" to serve that interest. Pet. App. 33a, 39a. With respect to the provisions of the order relating to creditable advertising, the court held that those provisions were more restrictive than necessary to serve the government's stated interest because, in its view, the government had not justified the regulations' denial of credit for certain categories of private advertising. *Id.* at 38a. Noting the "fact-intensive nature" of the question of an appropriate remedy, the court remanded the case to the district court for a determination of the remedial question. *Id.* at 61a.

3. On remand to the district court, petitioners sought refunds of the assessments they paid to the Board, as well as reimbursement of monies that they

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reserve requirements used to stabilize the volume of almonds marketed (*id.* at 47a-60a); and the administrative procedure for challenging the order (*id.* at 60a-61a).

paid to third parties, such as advertising and promotional firms, for creditable advertising. Pet. App. 71a. Petitioners Cal-Almond, Saulsbury Orchards and Frazier Nut Farms, Inc. also sought the release of monies that they placed in escrow accounts in lieu of paying assessments to the Board or conducting their own creditable advertising. The Secretary asserted in response that principles of sovereign immunity barred reimbursement of sums that petitioners spent on creditable advertising rather than paid to the Board. Citing *Bowen* v. *Massachusetts*, 487 U.S. 879, 895 (1988), the Secretary argued that the former sums were "damages" for purposes of sovereign immunity analysis because they were sought as a "substitute for a suffered loss." Pet. App. 72a-74a.[5]

The district court held that petitioners were entitled both to a refund of the portion of past assessments attributable to Board-sponsored promotional programs, and to funds they paid to third parties for creditable advertising. The court ordered the government to pay petitioners a monetary award of approximately $4.3 million, consisting of: (1) $135,000 in assessments that petitioners paid to the Board; (2) $1.7 million in assessments that certain petitioners had placed in escrow accounts pending the

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[5] The government also urged the court of appeals to remand the case to the Department of Agriculture, pursuant to 7 U.S.C. 608c(15)(B), for an initial determination of the appropriate remedy. The government argued that additional fact-finding by the Department was necessary to determine whether plaintiffs "passed through" some of their advertising costs to their growers. In the alternative, the government urged the district court to conduct an evidentiary hearing to make those determinations. See Pet. App. 79a-94a.

outcome of the litigation; and (3) $2.5 million representing sums petitioners paid to third parties for creditable advertising. Pet. App. 66a-69a. The court rejected the Secretary's argument that sovereign immunity principles barred petitioners from recovering sums expended for creditable advertising. *Id.* at 77a. It concluded that "the refund or reimbursement of these amounts is part of an equitable remedy designed to give to these plaintiffs what * * * they were entitled to because of the violation of the First Amendment." *Ibid.*[6]

4. The court of appeals reversed in relevant part.[7] Pet. App. 3a-18a. It held that sovereign immunity precludes petitioners from recovering from the government their expenditures for creditable advertising. *Id.* at 7a. The court observed that "[r]equiring the USDA to reimburse the handlers for money they expended on creditable advertising would oblige the USDA to 'substitute' money from its coffers for money the handlers had paid to third parties." *Ibid.* "Unlike the assessments paid directly to the Board," the court explained, the government could not "return the 'precise property wrongfully taken' because that money was not paid to the USDA." *Ibid.* Reimbursement of the money petitioners spent on creditable advertising, the court held, would therefore constitute damages. *Ibid.* Because "nothing in the

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[6] The district court denied petitioners' request for prejudgment interest, holding that such an award was barred by sovereign immunity. Pet. App. 78a.

[7] The court affirmed the district court's refusal to reduce the amount of petitioners' refund to take into account the benefit that plaintiffs received from the generic advertising purchased with their assessments. Pet. App. 11a-14a. That aspect of the court of appeals' decision is not at issue here.

[AMAA] demonstrates congressional intent to waive sovereign immunity for the claims raised by [petitioners]," the court held that their "claims for reimbursement for money spent on creditable advertising are barred by sovereign immunity." *Ibid.*[8]

ARGUMENT

1. The court of appeals correctly held that the doctrine of sovereign immunity bars a judicial order requiring the government to reimburse petitioners for monies they paid to third parties for creditable advertising. The United States may be sued only with respect to matters for which Congress has waived sovereign immunity. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Eckford*, 73 U.S. (6 Wall.) 484, 490 (1867). A waiver of sovereign immunity, moreover, cannot be found in the general purposes of a statute, *United States* v. *Testan*, 424 U.S. 392, 399-400 (1976), or in policy considerations underlying the statute, *Library of Congress* v. *Shaw*, 478 U.S. 310, 320-321 (1986). Rather, "the 'unequivocal expression' of elimination of sovereign immunity that [the Court] insist[s] upon

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[8] The government has filed a petition for a writ of certiorari seeking review of the judgment of the court of appeals with respect to the underlying First Amendment issue, *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879 (filed May 20, 1996). In that filing, we urge the Court to hold the petition for disposition in light of the outcome in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, cert. granted, No. 95-1184 (June 3, 1996). In *Wileman Bros.*, the Ninth Circuit relied on its initial decision in the present case to hold that similar assessment-funded promotional programs authorized under the AMAA for peaches, nectarines, and plums violate the First Amendment.

is an expression in statutory text." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

Like a waiver of sovereign immunity itself, a waiver of immunity to a particular remedy also "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969). "[T]he Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 503 U.S. at 33-34 (citations and internal quotation marks omitted). Accordingly, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane* v. *Pena*, 116 S. Ct. 2092, 2096-2097 (1996). Because the relief that petitioners seek here constitutes monetary damages for which Congress has not waived the government's sovereign immunity, petitioners' claims are barred.

a. Petitioners err in contending (Pet. 8) that, by enacting 7 U.S.C. 608c(15), "Congress unequivocally consented" to suits for damages by handlers. Section 608c(15) affords handlers of agricultural commodities the right to seek administrative review of "any [marketing] order or any provision of any such order or any obligation imposed in connection therewith," on the ground that the challenged provision or obligation is "not in accordance with law." 7 U.S.C. 608c(15)(A). A handler may seek judicial review of the Secretary's decision in the district court, which is "vested with jurisdiction in equity to review" a ruling of the Secretary. 7 U.S.C. 608c(15)(B). While Section 608c(15)(A) authorizes judicial review of the Secretary's rulings, nothing in that provision unambiguously extends the waiver of sovereign immunity to

monetary damages. See *Lane* v. *Pena*, 116 S. Ct. at 2096-2097. To the contrary, the explicit statutory conferral of jurisdiction only "in equity" forecloses an award of a legal remedy such as money damages. See *Mertens* v. *Hewitt Associates*, 508 U.S. 248, 255 (1993).

b. Petitioners incorrectly assert (Pet. 14-15) that the decision below conflicts with *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). *Ruzicka* held only that a handler must exhaust the administrative remedy provided by the AMAA before pursuing a challenge to a marketing order in federal court, and that the handler may not withhold assessments during the pendency of those proceedings. It did not address the scope of the waiver of immunity effected by Section 608c(15), or the particular remedies that are available in administrative or judicial proceedings under the AMAA. 329 U.S. at 289-294.

c. Petitioners next contend (Pet. 13) that compensation for funds they paid to third parties for creditable advertising would not be damages, but rather "equitable relief * * * and therefore not repugnant to the sovereign immunity doctrine." This Court has recognized a distinction under the sovereign immunity doctrine between money damages and specific monetary relief. "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not *substitute* remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 895 (1988) (quoting *Maryland Dep't of Human Resources* v. *Department of HHS*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)).

Petitioners paid the funds at issue here—expenses for private, creditable advertising—not to the govern-

ment, but to third parties. Moreover, the government was not required, under the AMAA or the Constitution, to expend public funds for private advertising. Accordingly, as the court of appeals observed (Pet. App. 7a), "[the government] cannot return the precise property wrongfully taken," and a "refund" of petitioners' losses would represent damages rather than specific relief. Because "nothing in the [AMAA] demonstrates congressional intent to waive sovereign immunity" for monetary damages (*ibid.*), the court correctly held that such compensation is barred.[9]

d. Petitioners suggest (Pet. 13-14) that because the almond marketing order considers both creditable-advertising expenses and past assessments in calculating certain types of refunds to handlers, 7 C.F.R. 981.81(b), a judicial decree ordering the "refund" of either amount would not represent damages under the sovereign immunity doctrine.[10] The

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[9] Nor is there any merit to petitioners' contention (Pet. 16) that the court of appeals' prior liability determination in this case (Pet. App. 27a-39a) established that the funds at issue were illegally "exacted or retained," *United States* v. *Testan*, 424 U.S. 392, 401 (1976), by the government. As the court of appeals explained in the opinion below (Pet. App. 10a), its prior decision held only that the system of assessments for generic almond promotion and credits for certain private advertising violated the First Amendment. That decision did not address "whether the recovery would require the USDA to reimburse the handlers for money they paid to third parties [in light of] the doctrine of sovereign immunity." *Ibid.*

[10] The regulation on which petitioners rely provides in pertinent part:

> Any funds in each portion of the operating reserve fund in excess of the level authorized * * * shall be refunded to handlers or used to reduce the assessment rate of the subsequent crop year * * *. Each handler's share of a

provision to which petitioners refer states only that both types of payments will be considered by the Board in determining the refund that a particular handler will receive in the event that funds collected by the Board in a given crop year exceed the Board's administrative and promotional expenses plus established carry-over and reserve amounts. That provision does not alter the fact that reimbursement for creditable advertising payments to third parties would be compensation for petitioners' losses, rather than a return of specific property that was wrongfully retained by the government. In any event, the Secretary could not waive federal sovereign immunity by promulgating a regulation; any effective waiver must be based on "affirmative statutory authority" from Congress. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940).[11]

> refund shall be the amount by which his payment of assessments exceeds his pro rata share of the two major classifications [administrative and research activities] of Board expenses. For the purpose of computing any refund from the marketing promotion portion, each handler's payment of assessments shall include any amount credited to the handler pursuant to [7 C.F.R.] § 981.41.

7 C.F.R. 981.81(b).

[11] Petitioners assert, without authority (Pet. 20), that "[s]ince § 608c(15) specifically gave handlers the right to sue, sovereign immunity does not bar refunds by the Almond Board, nor by Petitioners receiving credits against future assessments." Section 608c(15)(A) provides for judicial review of an order of the Secretary; it does not provide for suits or relief against the Board. Furthermore, the bar of sovereign immunity cannot be evaded merely by altering the form in which damages are awarded. Neither of petitioners' proposals would alter the compensatory nature of the relief they seek.

2. The tax cases cited by petitioners are inapposite for a number of reasons. See Pet. App. 13a, citing *Reich* v. *Collins*, 115 S. Ct. 547 (1994); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993); and *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). First, none of those cases involved a federal defendant and, consequently, none addressed the question of federal sovereign immunity. Second, each of the cases cited by petitioners involved the refund of monies paid *to the government* under a tax scheme later found to be invalid. See, *e.g.*, *Reich* v. *Collins*, 115 S. Ct. at 549. None of those cases stands for the proposition that due process requires a taxing authority to compensate taxpayers for expenses they paid to third parties as a result of an invalid tax regime. Petitioners' suggestion (Pet. 13) that the federal government must waive its sovereign immunity in this context in order to comport with the Due Process Clause is incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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